Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

EDWARD R. POPICK,

Petitioner,

v.

MICHAEL MOORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the principle of *nulla poena sine lege* is a requirement of due process of law and thus establishes a "constitutional right" for purposes of issuing a certificate of appealability.

II. Whether a federal habeas court may construe a state criminal statute so as to "save" the statute from noncompliance with the principle of *nulla poena sine lege*.

III. Whether this Court should exercise its supervisory power over a decision of a court of appeals that has sanctioned a departure from the accepted and usual course of proceedings in denying habeas relief and a certificate of appealability therefrom.

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Edward R. Popick respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit entered on December 31, 2001 in *Popick v. Moore*, Case No. 01-15024-E.

OPINIONS BELOW

A copy of the district judge's denial of the petition for a writ of habeas corpus is attached as Appendix C. A copy of the denial of the motion for a certificate of appealability by a single judge of the court of appeals is attached as Appendix A. A copy of the denial of the motion for a certificate of appealability by the district judge is attached as Appendix B. A copy of the denial of the motion for a certificate of appealability by a panel of the court of appeals upon reconsideration is attached as Appendix D.

STATEMENT OF JURISDICTION

The final decision of the United States Court of Appeals for the Eleventh Circuit was entered on December 31, 2001. This petition is timely filed pursuant to S. Ct. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, U.S. Constitution: ". . . nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(2)
Fla. Stat. § 893.135(1)(c)
Fla. Stat. § 893.03(2)(a)1.k
Fla. Stat. 893.13

STATEMENT OF THE CASE AND FACTS

In an Information filed on April 28, 1993, Dr. Popick was charged with four counts of trafficking in hydromorphone (trade name Dilaudid) in violation of *Fla. Stat.* § 893.135(1)(c) (1991). An amended information of March 8, 1994 added 63 counts. At that time, *Fla. Stat.* § 893.135(1)(c) prohibited "trafficking in illegal drugs" by "[a]ny person who knowingly sells . . . 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof. . . ." Hydromorphone was not listed.

On March 16, 1994, Dr. Popick pleaded guilty to all sixty-seven counts of trafficking. In 1995, the Florida Legislature recognized several gaps in the trafficking statute and "create[d] the offenses of trafficking in oxycodone, hydrocodone, hydromorphone, or any salt, isomer, or salt of an isomer of these substances."[1] The legislative staff analysis

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1. The legislative staff analysis of CS/HB 1385, the bill that became Fla. Stat. § 893.135(1)(C)1, explained that the "the bill amends s.893.135(1)(C)1 to *create* the offences of trafficking in oxycodone, hydrocodone, *hydromorphone*, or any salt, isomer or salt of an isomer of these substances." [*e.s.*] Under the heading "Effect of Proposed Changes," the staff analysis concludes that trafficking in hydromorphone "*will be prohibited and made a first degree felony*." [e.s.] [Quotations from "Final Bill Analysis & Economic Impact Statement," May 12, 1995.]

for the bill stated that hydromorphone is one of several "semi-synthetic derivatives of opium which are not listed in this statute. . . ."[2]

In 1999, after unsuccessful postconviction proceedings in the state courts, Dr. Popick filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida (Tampa Division). In its order of July 30, 2001, the district court found that as his first claim "Popick alleges that trafficking in hydromorphone was not a crime in Florida in 1994 when he entered his guilty plea." App. C-7a. The court concluded that "Popick has adequately exhausted state court remedies for his first ground for relief." *Id.*

The district court acknowledged that "[t]he 1991 version" of § 893.135(1)(c), the trafficking statute, did not list hydromorphone, although it was listed in § 893.03(2)(a)1.k as a Schedule II controlled substance. App. C-9a. The district court further observed that "[t]he 1991 version of the [trafficking] statute only covers the forms containing opium or morphine. The 1995 version corrects this oversight and includes the specified drugs. . . ." App. C-11a.

The court further acknowledged Petitioner's reliance upon this passage from *State v. Diloreto*, 600 So. 2d 25, 26 (Fla. 4th DCA 1992):

> trafficking under section 893.135(1)(c)3(1989) does not encompass all controlled substances listed in sections 893.03(1)(b) or (2)(a), Florida Statutes, but only those specified by its terms. The statute must be accorded its plain meaning.

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2. *Id.*

The district court proceeded to question the continuing validity of *Diloreto* in light of dictum in another Florida case, *Todd v. State*, 648 So. 2d 249 (Fla. 3d DCA 1994). App. C-14a. The court then concluded that "[t]he reference in § 893.135(1)(c) sufficiently identifies hydromorphone as subject to the trafficking statute to satisfy the requirement of due process." App. C-14a. In reaching this conclusion, the court recited from the PDR, correctly, that Dilaudid is "a hydrogenated ketone of morphine, a derivative of opium." It did not in that regard acknowledge that the word "derivative" was of 1995 vintage and did not appear in the 1991 statute, which proscribes only "any salt, isomer, or salt of an isomer thereof" of the listed substances.[3] The court denied the petition for writ of habeas corpus. App. C-15a.

Subsequently, Petitioner filed a notice of appeal and moved in the district court for a certificate of appealability [COA] on the ground that the petition presented a substantial showing of the denial of a federal right" under *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) and that "jurists of reason" could reach a different result. *Roberts v. Sutton*, 217 F.3d 1337, 1339 (11th Cir. 2000). Petitioner further urged that it was improper for the habeas court to supply a saving construction to a state statute and that, if the statute was to be construed at all, it should be done by the Florida Supreme Court pursuant to *Fla. R. App. P.* 9.150, a procedure well known to the Eleventh Circuit. *See Blue Cross and Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997). The district court, citing *Estelle*, denied the COA. App. B-4a.

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3. A ketone is "an organic chemical compound containing the divalent carbonyl group, CO, in combination with two hydrocarbon radicals." *Webster's New Universal Unabridged Dictionary* (2d ed. 1999). It is not a "salt, isomer, or salt of an isomer."

Petitioner then moved in the court of appeals for a COA. A single judge denied the COA for "the reasons outlined at length in the district court's thorough order. . . ." App. A-2a. Pursuant to 11th Cir. R. 27-1(d), Petitioner moved for panel reconsideration. In its order of December 31, 2001, the court reconsidered but again denied the COA "for failure to make the requisite showing." App. D-16a.

SUMMARY OF THE ARGUMENT

Petitioner was convicted of and punished for a non-existent crime. Each of his applications for a certificate of appealability was denied on the basis that he had failed to make a "substantial showing" of the denial of a federal right. It was impossible to reach such a conclusion without denigrating the principle of legality as a requirement of due process of law binding on habeas review and sufficient to require the issuance of a certificate of appealability. This Court should grant a writ of certiorari to review the decision below in order to establish that the principle of legality, *nulla poena sine lege*, is "not only an ancient maxim" but also "a requisite of due process." *United States v. Bodiford*, 753 F.2d 380, 382 (5th Cir. 1985). It does not appear that this Court has ever squarely so held, either on direct review or collateral review. This case presents an appropriate vehicle for doing so.

Second, the state penal statute at issue was "saved" from noncompliance with the principle of legality by a construction supplied by the habeas court, in complete disregard of the rule of lenity. Further, construction of the statute and its interpretive case law violated principles of federalism and comity. A federal court is bound to take a challenged state statute at face value. *Coates v. City of Cincinnati*, 402 U.S.

611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971). "Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out . . . , we are without power to remedy the defects. . . ." *Hynes v. Oradell*, 425 U.S. 610, 622, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

Finally, certiorari should be granted in the exercise of this Court's supervisory power over a decision of a court of appeals that has sanctioned a departure from the accepted and usual course of judicial proceedings in denying Petitioner a COA from the denial of habeas relief.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT CONSTITUTIONAL ISSUE WHETHER THE PRINCIPLE OF *NULLA POENA SINE LEGE* IS A REQUIREMENT OF DUE PROCESS OF LAW AND AS SUCH A "CONSTITUTIONAL RIGHT" SUFFICIENT TO REQUIRE ISSUANCE OF A COA FROM THE DENIAL OF HABEAS RELIEF.

The principle of legality is "*the* first principle" of American criminal law. Herbert L. Packer, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968). It pre-dates the adoption of the U.S. Constitution. It has been described as "the most fundamental principle of our criminal justice system" and means that "no punishment may be inflicted except for violation of law." *United States v. Carpenter's Goldfish Farm*, 998 F.2d 692, 695 (9th Cir. 1993). "We thus have a system in which persons can be subjected to punishment only for violation of specific statutes. . . ." *Id.* "[I]t is elementary that a defendant may be convicted only of an offense defined by statute, not because his conduct is reprehensible."

United States v. Bodiford, 753 F.2d 380, 382 (5th Cir.1985). This requirement of prior definition of a crime is at the heart of the rule of law characteristic of Anglo-American jurisprudence. J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

The acts for which Dr. Popick was punished were not "clearly forbidden" as trafficking in violation of Florida law at the time of his convictions, as required by the principle of *nulla poena sine lege*. Rather, the federal habeas judge declared that such acts were covered by the 1991 statute, despite its facial silence on the matter and subsequent amendment to "create" the very offenses of which Petitioner was previously convicted. Such federal construction of a state penal statute was improper in and of itself under principles of federalism and comity.

Further, to arrive at his elliptical conclusion that "[t]he reference in § 893.135(1)(c) sufficiently identifies hydromorphone as subject to the trafficking statute," the habeas judge necessarily disregarded the principle of lenity, which requires as a prerequisite to conviction of crime that defendant's conduct must be "plainly and unmistakably" within the charged statute. *United States v. Gradwell*, 243 U.S. 476, 485, 37 S. Ct. 404, 410 L. Ed. 857 (1917). As this Court has said more recently, "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

The rule of lenity, moreover, is part and parcel of the principle of legality. As the distinguished jurist and legal scholar Judge Jack Weinstein has put it, "[t]he rule of lenity, favoring the defendant, dovetails with the common law

maxim of *nulla poena sine lege* (there can be no punishment without law)." *United States v. H*, 2001 WL 1646465, *7 (E.D.N.Y.). One searches the orders of the courts below in vain for any mention of the rule of lenity or the principle of *nulla poena* of which it is a part. On the contrary, the court of appeals explicitly endorsed the reasoning of the district court. App. A-2a.

Although the lower federal courts have not infrequently invoked the maxim of *nulla poena*, this Court has not apparently ever held it to be a requisite of due process of law either on direct review or on habeas review. *But cf. Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960). *See also Kring v. Missouri*, 107 U.S. 221, 230-31, 2 S. Ct. 443, 27 L. Ed. 506 (1883), invoking the principle of legality in the context of *ex post facto* analysis: "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority, before the imputed offence was committed, and which existed as a law at that time."

Four members of this Court did invoke the *nulla poena sine lege* principle of legality in *Rogers v. Tennessee*, 532 U.S. 451, 467, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), describing it as "one of the most 'widely held value judgments in the entire history of human thought'. J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960)." (Scalia, J., dissenting). But the majority viewed the case as one involving only adjudicative changes in controlling penal law, rather than application of a statute to conduct outside its reach. Thus, this Court has yet to speak authoritatively on the constitutional status of *nulla poena sine lege*.

This case provides an appropriate vehicle for ruling on that issue. In denying Petitioner's applications for a COA,

the lower courts necessarily disregarded or undervalued the proper weight to be accorded to a violation of the principle of legality inherent in the State's convicting Petitioner of non-existent trafficking offenses. Even if the district court's "close enough"[4] reasoning be credited as a basis for denying the writ, it was not possible reasonably to negate that "jurists of reason" might differ on appeal without denigrating the constitutional stature of the principle of legality. The court of appeals should have issued a COA.

II. A FEDERAL HABEAS COURT MAY NOT CONSTRUE A STATE CRIMINAL STATUTE SO AS TO "SAVE" THE STATUTE FROM NONCOMPLIANCE WITH THE PRINCIPLE OF *NULLA POENA SINE LEGE*.

The district judge never squarely stated that § 893.135 included hydromorphone, and of course the statute did not do so by its terms. On the contrary, his order concedes that it was not a listed drug in the 1991 version and stated that the Legislature corrected this "oversight" by adding hydromorphone in the 1995 version. App. C-11a. Rather than invoking the rule of lenity, he engaged in an exceptionally athletic construction of a state penal statute that was not ambiguous to begin with. This was doubly improper.

First, a federal court must take a challenged state statute at face value and cannot find it valid on the basis of a limiting

4. Without quite saying so, the district court implied that Petitioner was not entitled to relief from the trafficking offenses because he might have been convicted of non-trafficking drug offenses. *See* App. C-13a n.6. That implication is wrong. "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson v. Virginia*, 443 U.S. 307, 323, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

construction that it supplies. *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971). "Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out . . . , we are without power to remedy the defects. . . ." *Hynes v. Oradell*, 425 U.S. 610, 622, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

Second, the judicial construction that he employed "was unexpected and indefensible by reference to the law which had] been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. The case condemns "judicial enlargement of a criminal act by interpretation." *Id.*

It would have been unconstitutional for such a result to have been created by the state court of last resort, much less a federal habeas judge. Thus, even assuming *arguendo* that the federal habeas judge had the authority to construe a state penal statute at all, the principle of legality barred him from reaching the result that he reached. It is of no consequence that Petitioner might have been charged with the less serious violation of § 893.13 because that section specifically incorporates by reference controlled substances listed in § 893.03(2)(a).[5] Again, Petitioner presented a substantial

5. Violation of § 893.13 is a second degree felony, whereas trafficking under § 893.135 is a first degree felony. Under *Calder v. Bull*, 3 Dall. 386, 390, 3 U.S. 386, 1 L. Ed. 648 (1798), a law is prohibited as ex post facto if it "aggravates a crime, or makes it greater than it was when it was committed."

showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2), and the court of appeals should not have denied a COA.

III. CERTIORARI SHOULD BE GRANTED TO EXERCISE THIS COURT'S SUPERVISORY POWER OVER A DECISION OF A COURT OF APPEALS THAT HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DENYING HABEAS RELIEF AND A COA.

Petitioner adopts and incorporates by reference the arguments made in support of Points I and II above. His claim that trafficking in hydromorphone was not a crime in Florida at the time of his convictions was certainly a substantial showing of the denial of a constitutional right, and it was sufficiently debatable among jurists of reason to require issuance of a COA. The district court should not have turned interpretive somersaults with the trafficking statute, surrounding case law and organic chemistry[6] to deny relief and then also deny a COA. Affirmance of the denial of a COA by the court of appeals, based explicitly on the reasoning of the district court, is sufficient in the circumstances of this case to call for the exercise of this Court's supervisory power under S. Ct. Rule 10(a).

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6. The district court trivialized *Diloreto*'s point that trafficking "does not encompass all controlled substances" by engaging in an extended and somewhat convoluted argument, grounded in chemistry, as to the organic or synthetic form of listed drugs and then improperly placing a burden of proof on Petitioner as to the source or origin of the drugs that he allegedly distributed. App. C-14a. But this case is not about chemistry or evidence; it is about what was listed by name in the 1991 statute — and what was not.

CONCLUSION

The petition for a writ of certiorari should be granted. The cause should be remanded to the court of appeals for issuance of a COA and to allow an appeal on the merits of Petitioner's claim that trafficking in hydromorphone was not a crime under Florida law at the time of his convictions.

Respectfully submitted,

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